IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1780

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON AND MARSENA DARLENE WALKER,

Petitioners,

v.

GENTRY CROWELL, SECRETARY OF STATE OF THE STATE OF TENNESSEE; RAY BLANTON, GOVERNOR OF STATE OF TENNESSEE AND HIS SUCCESSORS IN OFFICE; BROOKS MCLEMORE, ATTORNEY GENERAL OF THE STATE OF TENNESSEE AND HIS SUCCESSORS IN OFFICE; DAVID COLLINS, COORDINATOR OF ELECTIONS OF THE STATE OF TENNESSEE; AND JAMES E. HARPSTER, JACK C. SEATON, TOMMY POWELL, RICHARD HOLCOMB, AND LYTLE LANDERS, COMMISSIONERS OF THE STATE BOARD OF ELECTIONS,

Respondents.

PETITION FOR REHEARING

LAUGHLIN, HALLE, REGAN,
CLARK & GIBSON
JOHN L. RYDER
ROBERT G. BRADY
2201 First Tennessee
Bank Building
Memphis, Tennessee 38103
Counsel for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

Table of Cases Cited

Miscellaneous Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1780

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON AND MARSENA DARLENE WALKER,
Petitioners,

v.

GENTRY CROWELL, SECRETARY OF STATE OF THE STATE OF TENNESSEE; RAY BLANTON, GOVERNOR OF STATE OF TENNESSEE AND HIS SUCCESSORS IN OFFICE; BROOKS MCLEMORE, ATTORNEY GENERAL OF THE STATE OF TENNESSEE AND HIS SUCCESSORS IN OFFICE; DAVID COLLINS, COORDINATOR OF ELECTIONS OF THE STATE OF TENNESSEE; AND JAMES E. HARPSTER, JACK C. SEATON, TOMMY POWELL, RICHARD HOLCOMB, AND LYTLE LANDERS, COMMISSIONERS OF THE STATE BOARD OF ELECTIONS,
Respondents.

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an Order modifying its Order of October 1, 1979, and granting this Petition. As grounds for this Motion, Petitioner states the following:

The Order of this Court dated October 1, 1979, remands this case to the District Court with instructions to dismiss. Petitioner respectfully requests that the Order of this Court be modified to remand the case for further proceedings.

The United States District Court for the Middle District of Tennessee sitting at Nashville entered an Order on January 15, 1979, which covered four points:

> "(1) Tennessee Code Annotated, §3-102, State Senatorial Districts — residence requirements, is declared unconstitutional;
>
> "(2) Defendants and their successors in office are enjoined from conducting or causing to be conducted any primary or general election pursuant to the provisions of Tennessee Code Annotated, §3-102;
>
> "(3) The Court retains jurisdiction of this action, and in the event no constitutional plan of apportionment of Tennessee Senatorial Districts is enacted by the General Assembly by June 1, 1979, this Court will impose a plan of apportionment;
>
> "(4) A reasonable attorney's fee will be awarded as part of the costs taxed to Defendants, and a hearing to determine the amount of said fee will be held on a date to be determined." (Appendix to Jurisdictional Statement of Appellants, page A-8)

Defendants appeal was taken from this Order during the pending of the appeal, TCA 3-102 was amended. Parts 1 and 2 of the District Court's Order are clearly moot. However, parts 3 and 4 require further proceedings in the Court below. In fact, the District Court has scheduled a hearing for November 14, 1979, on point 3. See attached Exhibit 1. Plaintiff and Defendants have engaged in substantial preparation for this hearing, including discovery proceedings. See attached Exhibit 2.

As in the case of *Diffenderfer vs. Central Baptist Church of Miami,* 404-05-412, 92 S. Ct. 574 (1972), this case should be remanded for further proceedings. In that case the challenged statute was amended before this Court rendered its opinion.

Finding that the Plaintiffs might wish to attack the newly enacted legislation, this Court remanded with leave to amend the pleadings to permit such a challenge. *Diffenderfer vs. Central Baptist Church of Miami,* supra. 29 S Ct. at 576. In the instant case, Plaintiffs have already begun an attack on the newly enacted legislation. All that is necessary is to permit the lower Court to hold the hearing now scheduled.

The District Court, in its Order, retained jurisdiction for the purpose of considering an attack on the new legislation. As noted by Appellants in their statement of the case, the amendments were enacted "in order to attempt to comply with the Court's Order." Jurisdictional Statement, page 10. Appellees noted in their Motion to Dismiss that consideration of the amendments (Senate Bill 712) was premature at the time of the appeal. Consideration of the constitutionality of Senate Bill 712 is now appropriate, at the trial level.

This retention of jurisdiction and subsequent hearing on the constitutionality of a plan of apportionment is a method previously used by the District Courts in Tennessee. *Kopald v. Carr,* 343 F. Supp. 51 C.M.D. Tenn. (1973); *Bright v. Crowell,* No. 78-3148 (M.D. Tenn.); The District Courts have broad powers to shape the appropriate relief in apportionment cases. *Reynolds v. Simms* 377 U.S. 539, 84 S. Ct. 1392; 12 L.Ed., 506 (1964).

Furthermore, the interest of justice would be served by resolving the issue of the constitionality of amendments to TCA 3-102 in this proceeding, rather than terminating this case at this time which would necessitate a new lawsuit, a new three-judge court, and new hearings in order to test the validity of those amendments. The matter has been certified as a class action, so that all necessary plaintiffs are present. The hearing scheduled for November 14, 1979 should be allowed so that the validity of the State Senate Districts can be determined prior to the 1980 elections.

In the fourth part of the District Court's Order attorneys fees were awarded with the amount of the fee to be determined in a hearing to be held later. That hearing has not been scheduled, pending completion of other matters before the Court, including determination of the constitutionality of the amendments to TCA 3-102.

Plaintiffs sought an award of attorneys fees pursuant to the Civial Rights Attorneys Fees Award Act of 1976, as amended, 42 USC §1988. The District Court in this case, in the exercise of its discretion, determined that such an award was appropriate. Termination of the case at this point would preclude Plaintiffs from recovering attorneys fees and contradict the legislative policy underlying 42 USC §1988. As stated in the Senate Report on the amendments to the Civil Rights Attorneys Fee Award Act:

> In many cases rising under our Civil Rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. 5 US Code Congressional and Administrative News, page 5910.

While the award of fees is discretionary with the Trial Court, this case it a particularly appropriate one for such an exercise of such discretion. Because of Tennessee's 60 year failure at reapportionment, the fountainhead case of all reapportionment matters was litigated in the Federal Courts, *Baker v. Carr,* 369 US 186 (1962). However, the inequities did not cease, but continued and were litigated in subsequent cases: *Baker v. Carr,* 247 F. Supp. 629 (1967), *Baker v. Ellington,* 273 F. Supp. 174 (1967), *Lopald v. Carr,* 343 F. Supp. 51 (1972), *Brawner v. Crowell,* and *White v. Crowell,* 434 F. Supp. 1119 (1977),

Sullivan v. Crowell, Nelson v. Crowell, and *Algood v. Crowell,* 444 F. Supp 60 (1978), *Bright v. Crowell, supra,* and this case. With the exception of the three Baker cases, all of these cases have been brought within the last seven years. The thread running through all of these cases is that unless forced into compliance by orders of the Federal Courts, the Tennessee General Assembly will not enact reapportionment legislation meeting the basic constitutional tests and limitations. In this matter, Plaintiffs were forced again to seek relief from the Courts in order to obtain the rights guaranteed them under the Fourteenth Amendment. A hearing on the amount of attorneys fees should be allowed to take place in lower court.

CONCLUSION

For the reasons stated herein, Petitoner respectfully requests that the Order of the Court entered October 1, 1979, be modified to remand the case to the District Court for the Middle District of Tennessee, for further proceedings in accordance with parts 3 and 4 of its Order of January 13, 1979.

Respectfully submitted,

LAUGHLIN, HALLE, REGAN,
CLARK & GIBSON

John L. Ryder
2201 First Tennessee
Bank Building
Memphis, Tennessee 38103

Counsel for Petitoners

Dated: October 13, 1979

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58.

John L. Ryder
Counsel for Petitoners

CERTIFICATE OF SERVICE

I, John L. Ryder, do hereby certify that a copy of the foregoing Petition for Rehearing has been served on Robert B. Littleton, Deputy Attorney General, State of Tennessee, and William W. Hunt, III, Assistant Attorney General, State of Tennessee, by mailing a copy fo same, postage prepaid, this 13th day of October, 1979.

John L. Ryder